Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-35–11 OF 2019(B)
AZAHAR MOHAMED CJ (MALAYA), VERNON ONG AND ZABARIAH MOHD FCJJ
12 JANUARY 2021

Land Law — Acquisition of land — Award — Whether decision of Land Reference Court on compensation was final and non-appealable — Whether questions framed before appeal court by land owners alleging failure of High Court to properly determine market value of acquired lands and to grant injurious affection compensation were not in substance questions of law but concerned compensation — Whether nothing in land owners' appeal record suggested High Court judge or assessors had erred in fact or law by either not considering the evidence tendered or failing to apply principles of law relating to determination of compensation — Whether record showed High Court judge and assessors had considered all evidence tendered and had even visited subject lands to determine question of injurious affection — Meaning to be accorded to phrase 'taking possession of the land' in s 32(1C) and 'took possession of the land' in s 48 of Land Acquisition Act 1960 ('LAA') — Whether 2016 amendments to ss 32 and 48 of LAA reducing late payment charges from 8% to 5%pa did not operate retrospectively to deny land owner of the 8% rate since his land reference proceedings were initiated before the amendments came into force — Whether s 51(1)(c) of LAA precluded land owner from being awarded costs for High Court proceedings since the amount of his claim exceeded the amount that was awarded by the court by more than 20% — Land Acquisition Act 1960 ss 40D & 49(1)

The government compulsorily acquired two contiguous lands owned by the appellants for a highway project ('SILK'). Following an enquiry under the Land Acquisition Act 1960 ('the LAA'), the land administrator ('LA') awarded the appellants RM349,519.32 as compensation for the acquisitions. The appellants objected to the award causing the LA to refer the matter to the High Court. After hearing the parties, the High Court increased the award by RM708,221.66. The appellants appealed against the decision to the Court of Appeal ('COA') which set aside the decision and ordered the High Court to rehear the matter. Following a rehearing, the High Court increased the LA's award by RM2,411,788.58. The appellants appealed to the COA against the decision on several grounds, including the following: (a) that the High Court should not have disregarded some of the acquisition comparables the appellant had tendered in evidence for the purpose of assessing the market value of the acquired lands; (b) the High Court should have awarded compensation for

injurious affection for four other contiguous lots owned by the appellants adjacent to the acquired land; (c) whether the phrase 'taking possession of the land' or 'took possession of the land' occurring in ss 32 and 48, respectively, of the LAA meant the taking of physical possession or the taking of formal possession under s 22 of the LAA; (d) whether the applicable late payment interest rate in the instant case was 5% or 8%pa; and (e) whether the High Court should have awarded the appellants compound interest and costs. The COA dismissed the appeal holding that: (i) the High Court judge and the assessors had found the government valuer's evidence on the market values of the acquired lands more acceptable than that submitted by the appellants' private valuer; (ii) the facts and circumstances did not warrant compensation for injurious affection for the four contiguous lots; (iii) the phrase 'taking possession' in ss 32 and 48 of the LAA meant physically taking control or occupancy of the land and not the taking of formal possession under s 22 of the LAA and, as such, the LA did not have to pay late payment charges after SILK took physical possession of the land; (iv) the late payment charge applicable was 5%pa; (v) payment of compound interest was not provided for in the LAA; and (vi) the appellants were not entitled to costs of the High Court proceedings under s 51(1)(c) of the LAA since their claim (for RM12,004,000) exceeded the amount awarded by the High Court (RM2,411,788.58) by more than 20%. The instant appeal was against the COA's decision.

Held, unanimously allowing the appeal in part:

(1) The questions concerning the determination of the market value of the acquired lands and injurious affection affecting the four contiguous lots were not questions of law. The conclusions reached on both questions were essentially findings of fact on the evidence. Both questions related to a decision of the High Court on compensation which decision was final and non-appealable under ss 40D and 49(1), respectively, of the LAA. In any event, the appeal record showed that the High Court judge had considered all the acquisition and sale comparables tendered by both parties and had taken account of the opinions of the assessors before arriving at his decision. Nothing in the appeal record showed that the judge or the assessors had committed any error of law or of fact either in not properly considering the evidence or in failing to apply the principles relating to the determination of compensation (see paras 54–55 & 76).

(2) The High Court's decision not to award injurious affection for the four contiguous lots was a question of fact upon which the judge had given proper consideration and his findings were substantiated by the evidence and facts in the appeal record. Before coming to his decision, the judge and the assessors had visited the site to see for themselves the situation on the ground accompanied by the appellants' solicitors, the respondent's representative and the private and government valuers. It was following

A the site visit that the judge decided, after considering the views of the assessors, on the issue of injurious affection (see paras 56–57).

(3) On the facts and the law, the phrase 'taking possession of the land' in s 32(1C) of the LAA meant the taking of physical possession of the B subject lands by SILK while the phrase 'took possession of the land' in s 48 of the LAA meant the taking of formal possession of the subject lands by the LA upon service or posting of a Form K notice under s 22 (see paras 61–63 & 77).

C (4) The words 'compound interest' was a misnomer. Section 32 related to the amount of compensation awarded by the LA while s 48 related to the excess, if any, awarded by the High Court. The amount awarded by the LA, ie, 'RM349,519.32, was paid to the appellants on 9 May 2000. Since the words 'due date' in s 32 of the LAA meant the date SILK took physical D possession of the land on 19 September 1999, late payment charges at the rate of 8%pa on the RM349,519.32 should be paid to the appellants from 19 September 1999 till 9 May 2000 pursuant to s 32 of the LAA. As for the late payment charges on the RM2,411,788.58 awarded by the High Court, the applicable rate was again 8%pa running from 31 May E 2000 (the date the LA took formal possession of the subject lands under s 22) until the date of settlement (see paras 69, 71–72 & 79).

(5) The 2016 amendments to ss 32 and 48 of the LAA (reducing the late payment charge from 8% to 5%pa) did not operate retrospectively to deny the appellants of their substantive right to the late payment charge F of 8%pa, which right accrued to the appellants when they initiated the land reference proceedings in the High Court before the said amendments came into force (see para 78).

G (6) The courts below were correct in finding that the appellants were not entitled to any costs for the High Court proceedings pursuant to s 51(1)(c) of the LAA as their claim exceeded the amount that was awarded by the High Court by more than 20%. However, costs should have been, but were not, awarded to the appellants under s 14(5) of the H LA in respect of the proceedings that took place before the LA, which amount the LA was required to determine and which costs had to include any valuation fee and expenses incurred in the proceedings. This was an error of law on the LA's part warranting this court's intervention. Since the appellants had not indicated in their submissions what amount of I costs the LA should have awarded, in the interest of justice and in order not to prolong the proceedings any further, the parties were invited to submit on the quantum before the court made an order as to the amount due to the appellants (see paras 74–75 & 80).

[Bahasa Malaysia summary

Kerajaan telah secara wajib memperoleh dua tanah bersempadanan yang dimilik oleh perayu untuk satu projek lebuhraya ('SILK'). Lanjutan satu inkuiri di bawah Akta Pengambilan Tanah 1960 ('APT'), pentadbir tanah ('PT') telah mengawadkan perayu RM349,519.32 sebagai pampasan untuk perolehan tersebut. Perayu membantah kepada wad yang menyebabkan PT merujuk peraka tersebut ke Mahkamah Tinggi. Selepas mendengar pihak-pihak, Mahkamah Tinggi meningkatkan jumlah awad kepada RM708,221.66. Perayu merayu terhadap keputusan tersebut ke Mahkamah Rayuan ('MR') yang mengenepikan perintah tersebut dan memerintahkan agar Mahkamah Tinggi mendengar semula perkara tersebut. Lanjutan satu pendengaran semula, Mahkamah Tinggi meningkatkan awad PT kepada RM2,411,788.58. Perayu merayu kepada MR terhadap keputusan tersebut atas beberapa alasan, termasuklah yang berikut: (a) bahawa Mahkamah Tinggi tidak sepatutnya tidak menghiraukan beberapa perbandingan pemerolehan yang perayu telah kemukakan sebagai keterangan untuk tujuan membuat taksiran nilai pasaran tanah yang diperoleh; (b) Mahkamah Tinggi sepatutnya memberikan pampasan untuk keadaan yang merugikan kepada empat lagi lot yang bersempadanan yang dimiliki oleh perayu yang besebelahan dengan tanah yang diperoleh; (c) sama ada frasa 'mengambil milikan tanah tersebut' yang berada di ss 32 dan 48 APT bermaksud mengambil milikan fizikal atau mengambil milikan formal di bawah s 22 APT; (d) sama ada pembayaran faedah lewat dalam kes ini adalah 5% atau 8% setahun; dan (e) sama ada Mahkamah Tinggi sepatutnya memberikan perayu awad faedah kompan dan kos. MR mengenepikan rayuan tersebut dan memutuskan bahawa: (i) hakim Mahkamah Tinggi dan penaksir telah mendapati keterangan penaksir kerajaan berkaitan dengan harga pasaran adalah lebih boleh diterima daripada apa yang dihujahkan oleh penaksir swasta perayu; (ii) fakta dan keadaan tidak memerlukan pampasan untuk keadaan memberi kerugian kepada empat lot bersempadanan; (iii) frasa 'mengambil milikan' dalam ss 32 dan 48 APT bermaksud mengambil milikan secara fizikil atau mendiami tanah dan tidak mengambil milikan formal di bawah s 22 APT dan oleh yang demkian, PT tidak perlu untuk membayar caj bayaran lewat selepas SILK mengambil milikan tanah tersebut; (iv) caj pembayaran lewat yang terpakai adalah 5% setahun; (v) pembayaran faedah kompaun tidak diperuntukan dalam APT; dan (vi) perayu tidak berhak kepada kos dalam prosiding Mahkamah Tinggi di bawah s 51(1)(c) APT kerana tuntutan mereka (untuk jumlah RM12,004,000) melebihi jumlah yang diawadkan oleh Mahkamah Tinggi (RM2,411,788.58) lebih daripada 20%. Rayuan ini adalah terhadap keputusan MR.

Diputuskan, sebulat suara membenarkan sebahagian daripada rayuan:

(1) Persoalan berkaitan dengan penentuan nilai pasaran untuk tanah yang diperoleh dan keadaan merugikan yang memberi kesan kepada empat lot

bersempadanan bukanlah persoalan undang-undang. Kesimpulan yang dicapai berkaitan dengan kedua-dua persoalan adalah secara asasnya dapatan fakta berdasarkan keterangan. Kedua-dua persoalan adalah berkaitan dengan keputusan Mahkamah Tinggi berkaitan dengan pampasan yang mana keputusan tersebut adalah muktamad dan tidak boleh dirayu di bawah ss 40D dan 49(1) APT. Dalam apa keadaan sekalipun, rekod rayuan menunjukan bahawa hakim Mahkamah Tinggi telah menunjukkan semua perbandingan perolehan dan penjualan yang dikemukakan oleh kedua-dua pihak dan mengambil kira pendapat penaksir sebelum sampai ke keputusannya. Tiada apa-apa dalam rekod rayuan menunjukan bahawa hakim atau penaksir telah membuat apa-apa kekhilafan undang-undang atau fakta sama ada dalam tidak secara betul menimbangkan keterangan atau gagal untuk menggunapakai prinsip berkaitan dengan penentuan pampasan (lihat perenggan 54–55 & 76)

(2) Keputusan Mahkamah Tinggi untuk tidak memberikan awad keadaan merugikan untuk empat lot bersempadanan adalah satu soalan fakta yang mana hakim telah memberikan pertimbangan yang sepatutnya dan dapatannya disokong keterangan dan fakta dalam rekod rayuan. Sebelum tiba ke keputusan ini, hakim dan penaksir telah melawati tapak berkaitan untuk melihat sendiri dan diiringi oleh peguam perayu, peguam responden dan penaksir kerajaan dan swasta. Ianya adalah selepas daripada lawatan tapak tersebut bahawa hakim memutuskan, selepas mengambil kira pandangan penaksir atas isu kesan yang merugikan lihat perenggan 56–57)

(3) Berdasarkan fakta dan undang-undang, frasa 'mengambil milikan tanah' dalam s 32(1C) APT bermaksud mengambil milikan fizikal tanah tersebut oleh SILK manakala frasa telah mengambil milikan tanah dalam s 48 APT bermaksud mengambil milikan formal tanah tersebut oleh Pentadbir tanah selepas serahan atau pemaparan notis Borang K di bawah s 22 (lihat perenggan 61–63 & 77)

(4) Perkataan faedah kompaun adalah tidak padan. Seksyen 32 berkaitan dengan jumlah pampasan yang diawardkan oleh Pentadbir Tanah manakala s 48 adalah berkaitan dengan lebihan, sekiranya ada, yang diawardkan oleh Mahkamah Tinggi. Jumlah yang diawardkan oleh Pentadbir Tanah iaitu RM349,519.32 telah dibayar kepada perayu pada 9 Mei 2000. Memandangkan operkataan tarikh tamat dalam s 32 APT merujuk kepada tarikh SILK mengambil milikan fizikal tanah pada 19 September 1999, pembayaran caj bayaran lewat pada kadar 8% setahun pada jumlah RM349,519.32 sepatutnya dibayar kepada perayu dari 19 September 1999 sehingga 9 Mei 2000 selaras dengan s 32 APT. Berkaitan dewngan pembayaran caj lewat pada RM2,411,788.58 yang diawardkan oleh Mahkamah Tinggi, kadar terpakai adalah sekali lagi 8% setahun

yang bermula daripada 31 Mei 2000 (tarikh perntadbir tanah mengambil milikan formal tanah tersebut dibawah s 22) sehingga tarikh penyelesaian (lihat perenggan 69, 71–72 & 79).

(5) Pindaan 2016 kepada ss 32 dan 48 APT (pengurangan pembayaran caj bayaran lewat dari 8% ke 5% setahun) tidak bertindak secara kebelakang untuk menidakkan perayu daripada hak substantif mereka kepada pembayaran caj bayaran lewat pada kadar 8% setahun yang mana hak tersebut terakru kepada perayu apabila mereka memulakan prosiding rujukan tanah di Mahkamah Tinggi sebelum pindaan berkaitan berkuatkuasa (lihat perenggan 78)

(6) Mahkamah terdahulu adalah betul dalam dapatan bahawa perayu tidak berhak kepada apa-apa kos untuk prosiding Mahkamah Tinggi selaras dengan s 51(1)(c) APT kerana tuntutan mereka melebihi amaun yang diwadkan oleh Mahkamah Tinggi lebih daripada 20%. Namun kos sepatutnya tetapi tidak, diawadkan kepada perayu di bawah s 14(5) APT berkaitan dengan prosiding yang berjalan dihadapan Pentadbir Tanah, yang mana jumlahnnya perlu ditentukan oleh Pentadbir Tanah dan kos mana yang perlu dimasukkan dalam apa-apa yuran penaksiran dan perbelanjaan yang digunakan dalam prosiding. Ini merupakan satu kekhilafan undang-undang di pihak Pentadbir Tanah yang memerlukan campur tangan mahkamah ini. Memandangkan perayu tidak menyatakan dalam hujahan mereka jumlah kos Pentadbir Tanah sepatutnya mengawardkan, dalam kepentingan keadilan dan untuk tidak melanjutkan prosiding, pihak-pihak dijemput untuk menghujahkan atas kuantum dihadapan mahkamah sebelum satu perintah dibuat berkaitan dengan jumlah yang terhutang kepada perayu (lihat perenggan 74–75 & 80).]

Cases referred to

Belize; Grand Anse Estates Ltd v The Governor General et al (Civil Appeal No 3 of 1976), CA (refd)

Bertam Consolidated Rubber Co Limited v The Collector of Land Revenue Province Wellesley North Butterworth [1984] 1 MLJ 164, FC (refd)

Boustead Estates Agency Sdn Bhd v Pentadbir Tanah, Baling, Kedah [2007] 5 MLJ 401,CA (refd)

Bungsar Hill Holdings Sdn Bhd v Damansara Realty Bhd [2019] MLJU 222; [2019] 4 CLJ 429, FC (refd)

Canada (Director of Investigation and Research, Competition Act) v Southam Inc [1997] 1 SCR 748, SC (refd)

Carrier Lumber Ltd v Joe Martin & Sons Ltd [2003] BCJ No 1602, SC (refd)

Collector of Land Revenue v Looi Lam [1981] 1 MLJ 300, FC (refd)

D-G of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248, FC (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the

A *Sabah Foundation & Ors and another application* [1999] 1 MLJ 257; [1999] 1 CLJ 325, FC (refd)
Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor [2013] 2 MLJ 16, CA (refd)
I-Ntelink Inc v Broadband Communications North Inc [2017] MBQB 146
B (refd)
Inglewood Pulp and Paper Company, Limited v New Brunswick Electric Power Commission [1928] AC 492, PC (refd)
Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126; [2014] 7 CLJ 882, CA (refd)
C *Ketua Pengarah Hasil Dalam Negeri v United Malacca Bhd* [2017] 8 MLJ 413; [2017] 5 CLJ 502, HC (refd)
Leong Kam Hoong v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam and another appeal [2001] 1 MLJ 186, CA (refd)
Mohd Shah bin Daud v Pentadbir Tanah dan Jajahan Kota Bharu [2016] 3 MLJ
D 566; [2016] 6 CLJ 806, CA (refd)
National Land Finance Co-Operative Society Limited v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)
Pentadbir Tanah Daerah Hulu Langat v Mohamed Fawzi Mohd Yusof [2016] 1 LNS 570 (refd)
E *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392, FC (refd)
Polywell Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru, Johor [2014] 4 MLJ 142; [2014] 5 CLJ 129, CA (refd)
Premium Brands Operating GP Inc v Turner Distribution Systems Limited
F [2010] BCJ No 349, SC (refd)
San Jose Farmers' Co-operative Society Ltd v Attorney General (1991) 43 WLR 63, CA (refd)
Satinder Singh v Umrao Singh [1961] AIR SC 908, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another
G *case* [2017] 3 MLJ 561, FC (folld)
Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v Inch Kenneth Kajang Rubber Ltd [2011] 4 MLJ 403, CA (refd)
Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ 376, CA (refd)
H *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626; [2013] 9 CLJ 152, FC (refd)
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd [2012] 7 MLJ 597; [2012] 3 CLJ 249, HC (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)
I *The Revenue Divisional Officer Guntu v Vasireddy Rama Bhanu Bhupal* [1970] AIR AP 262, HC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541, FC (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Courts of Judicature Act 1964 ss 18, 68, 68(1)(d)
Federal Constitution arts 4, 4(3), (4), 13, 121, 121(1B)
Income Tax Act 1967
Interpretation Acts 1948 and 1967 s 30(1)(b)
Land Acquisition Act 1960 ss 3F, 14(5), 18, 19, 22, 28, 32, 32(1C), 37(1), (2), (3), 40(c), 40D, 40D(1), (2), (3), 43, 45(1A), 47(2), 48, 49, 49(1), 51, 51(1)(c), First Schedule, Forms D, H, K, N

Appeal from: Civil Appeal No B-01(A)-217–03 of 2018 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (Shireen Selvaratnam, Heng Yee Kiat and Lim Wei Jiet with her) (Christopher & Lee Ong) for the appellant.
Siti Fatimah bt Talib (Etty Eliany bt Tesno with her) (Selangor State Legal Advisor's Office) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] The appellants were the registered proprietors of two contiguous parcels of commercial land known as Lot 719 and Lot 1286, adjoining the SILK Highway ('subject properties'). This appeal relates to the acquisition of portions of two contiguous plots of land ('acquired lands') belonging to the appellants for the 'Projek Penyuraian Trafik Jalan Lingkaran Kajang (SILK) — Pembinaan Persimpangan Bertingkat Berhampiran Plaza Tol Kajang)' ('SILK Highway') in 1999 pursuant to the Land Acquisition Act 1960 ('the LAA 1960'). The declaration of intended acquisition was *gazetted* vide Form D on 25 November 1999.

[2] Following an enquiry, the land administrator issued the following awards of compensation on 7 April 2000:

Lot No	Title Land Area	Area Acquired	Compensation Awarded [RM]
719	1.9326 hectares	2,112.29 m2 (= 0.211229 hectares)	228,127.32
1286	1.7579 hectares	1,124 m2 (= 0.1124 hectares)	121,392.00
		Total Compensation:	349,519.32

[3] The LA's awards sum of RM349,519.32 was paid to the appellants on 8 May 2000. The appellants accepted the LA's award under protest and filed

objections on the compensation amount under Form N. In due course, the matter was referred to the High Court. After hearing of parties, on 30 November 2010 the High Court awarded the total excess sum of RM1,057,740.98; increasing the LA's award by a sum of RM708,221.66 ('2011 High Court order'). The excess sum was paid to the appellants on 6 June 2011.

[4] Dissatisfied, the appellants appealed to the Court of Appeal. Meanwhile, the appellants filed an application to refer certain constitutional questions to the Federal Court. On 20 April 2017, the Federal Court's ruling on the questions posed by the appellants are as follows:

(a) s 40D(3) and the proviso to s 49(1) of the LAA 1960 and s 68(1)(d) of the Courts of Judicature Act 1964 ('the CJA 1964') are not ultra vires art 121(1B) of the Federal Constitution particularly when read in the context of art 13 of the Federal Constitution; and

(b) s 40D(1) and (2) of the LAA 1960 are ultra vires art 121 of the Federal Constitution read in the context of art 13 of the Federal Constitution.

[5] In view of the Federal Court's decision, the Court of Appeal on 25 May 2017 remitted the matter to the High Court for rehearing. Consequently, the 2011 High Court order was set aside. After a rehearing of the matter, the High Court gave its decision on 16 March 2018 whereby the High Court allowed an excess sum of RM2,411,788.58 over and above the LA's awards. The particulars of the total amount awarded by the High Court are as follows:

No	Compensation	Amount (RM)
1	Market value of the acquired portion of Lot 719 (computed at RM410 per sqmt)	866,038.90
2	Market value of the acquired portion of Lot 1286 (computed at RM410 per sqmt)	460,840.00
3	Injurious affection in respect of the remainder of Lot 719 (computed at RM41 per sqmt)	705,774.00
4	Injurious affection in respect of the remainder of Lot 1286 (computed at RM41 per sqmt)	674,655.00
5	A building situated on the acquired lands	54,000.00
Total (RM)		RM2,761,307.90

[6] The appellants appealed to the Court of Appeal on eight questions of law:

Question 1 — Comparable acquisition issue:

Whether in accordance with para 1(1A) of the First Schedule to the LAA 1960,

the principle of equivalence and the decision of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), the High Court was right to disregard some of the appellants' comparables including the acquisition comparables — that is, the amount of compensation awarded by the Land Administrator for lands (which were situated within the vicinity of the acquired lands) when assessing the market value of the acquired lands;

Question 2 — Category of land use issue:

Whether the High Court could disregard the undisputed fact that prior to and at the time of the acquisition, the acquired lands were held under the category of land use 'Bangunan' with express condition 'Bangunan Perniagaan' when assessing market value of the acquired lands;

Question 3 — Injurious affection for contiguous lots issue:

Whether the High Court was legally obliged to award injurious affection for all the four contiguous lots (adjacent to the acquired lands) owned by the appellants in view of the following factors:

(a) injurious affection was awarded for the remainder of the acquired lands (owned by the appellants, of which a portion was compulsorily acquired by the respondent under the LAA 1960);

(b) the said four contiguous lots suffered from the same negative impact as the remainder of the acquired lands and were restricted to only one inadequate access road hence significantly impairing its development potential; and

(c) both assessors awarded injurious affection for the four contiguous lots

Questions 4 and 5 — Meaning of 'possession' issue:

Whether for the purpose of computation of late payment charges under s 32 of the LAA 1960, the phrase 'taking possession of the land' in s 32(1C) of the LAA 1960 means taking physical possession of the land or taking formal possession of the land under s 22 of the LAA;

Whether for the purpose of computation of late payment charges under s 48 of the LAA 1960, the phrase 'taking possession of the land' in s 48 of the LAA 1960 means taking physical possession of the land or taking formal possession of the land under s 22 of the LAA 1960;

Question 6 — Retrospective issue:

Whether the provisions of the LAA 1960, that is the Amending Act No A1517 (2016 Amending Act) — in particular, the amended rate of late payment charges, that is, 5%pa under ss 32 and 48 of the LAA 1960 – which came into force on 11 December 2017, apply to land reference proceedings pending before the High Court on 1 December 2017 in view of s 43 of the Amending Act;

Question 7 — Compound interest issue:

Whether the High Court ought to have awarded compound interest in order to adequately compensate the appellants for the loss suffered in accordance with the principle of equivalence; and

Question 8 — Costs issue:

Whether the High Court ought to have awarded costs to the appellants.

[7] The Court of Appeal dismissed the appellants' appeal. As the appellants' appeal before us relates to all the eight issues except the category of land use issue, we will set out a summary of the Court of Appeal's decision on the remaining seven questions.

COURT OF APPEAL'S DECISION

Question 1 — Comparable acquisition issue

[8] In the High Court, the appellants produced a valuation report by Jones Lang Wootton premised on seven comparables; three based on acquisition compensation awarded by the government for other lands acquired for public purposes in the larger vicinity of the subject properties (JLW Acquisition Comparables 1 to 3) and four sales comparable of similar properties (JLW Sale Comparables 1 to 4). The respondent's valuers, Jabatan Penilaian dan Perkhidmatan Harta (JPPH) adopting the comparison method selected eight sales comparables (JPPH Sale Comparables 1 to 8).

[9] The Court of Appeal took into account that the fact that: (a) in the High Court, the government assessor preferred JPPH Sale Comparable 4 whilst the private assessor chose JLW Sale Comparable 1 and JPPH Sale Comparable 4 as the most suitable comparables to determine the market value; and (b) in arriving at the market value of the acquired lands, the High Court found JPPH Sale Comparable 4 to be the most suitable comparable.

[10] The appellants' case was that the High Court erred in disregarding the JLW Acquisition Comparables 1 to 3. It was argued that even though the JLW Acquisition Comparables occurred in 1996, which is one year outside the two-year limitation period referred to in the First Schedule of the LAA 1960, they are still relevant as the said limitation period only applies to the value of sale comparables. In particular, JLW Acquisition Comparable 3 was especially suitable as it has the same category of land use (building/commercial) and location in the same district and mukim. As such, it only requires an upward adjustment for the one year time factor.

[11] The Court of Appeal (citing *Bertam Consolidated Rubber Co Limited v The Collector of Land Revenue Province Wellesley North Butterworth* [1984] 1 MLJ 164 (FC) and *Semenyih Jaya*) agreed that acquisition comparables could be considered in assessing market value. However, the Court of Appeal disagreed that the High Court erred in failing to use JLW Acquisition Comparable 3. In the High Court the two assessors had both chosen JPPH Sale Comparable 4 as a suitable choice for determining the market value of the acquired lands and the learned judge had decided to adopt the same. In arriving at their decision, the Court of Appeal made the following observations in paras [33]–[35] of the written grounds:

> 33. After carefully comparing the subject properties, PT 12066 (JPPH Sale Comparable 4) and Acquisition Comparable 3, we notice that Acquisition Comparable 3 and the subject properties share similarities in terms of their title, land use and category. Both are in the same vicinity and fronted the main road. There is however, a significant variance in terms of land area and the time of award. The land in Acquisition Comparable 3 is far smaller than the subject properties and the Court takes cognizance of the general knowledge that a smaller land generally fetches higher value. Also, the acquisition award was made three years prior to the valuation date of the subject properties. We note that the valuer JLW did not make any adjustment to these dissimilarities. (Parentheses added)
>
> 34. On the other hand, we also note that the subject properties and PT 12066 are similar in all respect except the locality and the land area. Cyberjaya is farther from the subject properties compared to Acquisition Comparable 4. PT 12066's land area is also larger than the subject properties.
>
> 35. Given that both the Government and private assessors have opined that PT 12066 is the most suitable comparable for determination of the market value of the subject properties and considering that they have taken into account the dissimilarities and adjusted accordingly, we take the view that the learned trial judge was not wrong in adopting PT 12066 as the most suitable comparable in arriving at the market value of the subject properties.

[12] In short, whilst the Court of Appeal held that acquisition comparables could be considered in assessing market value, it decided on the facts that the

A High Court did not err when it decided that JLW Acquisition Comparable 3 is not a suitable comparable for determining the market value of the acquired lands.

Question 3 — Injurious affection for contiguous lots issue

B

[13] The High Court awarded injurious affection for the remainder of the acquired lands at 10% of the market value on the basis that: (a) prior to the acquisition, the acquired lands were on the same level as the main road; and (b) as a result of the acquisition and construction of the SILK highway, the C acquired lands are ten feet lower than the highway level and the access road into and out of the lands are difficult and have limited site clearance. However, the High Court refused to award compensation for the injurious affection allegedly suffered by the four contiguous lots in determining the compensation.

D **[14]** The Court of Appeal noted that the four contiguous lots were affected by the acquisition in terms of the loss of access from the trunk road but decided not to award injurious affection because: (a) this problem has been remedied by the slip road built by LLM which provide access to the four contiguous lots; (b) two of the contiguous lots (Lots 718 and 2185) continue to enjoy access to the E main road through Lot 719 just as they did prior to the acquisition; (c) JLW did not explain what the alleged negative effects are; and (d) there is no negative effect as it is common to see residential houses and shop lots built on the lower ground along the highways and based on the improved accessibility through the slip road.

F

Questions 4 and 5 — Meaning of 'possession' issue

[15] The Court of Appeal found that the High Court had erred in deciding that the word 'possession' means taking formal possession under s 22 of the G LAA 1960. Instead, the Court of Appeal decided that the phrase 'taking possession' of the land in ss 32 and 48 of the LAA 1960 (relating to late payment charges) should be given its ordinary meaning, ie, physical control or occupancy of the land.

H **[16]** Whilst noting that SILK had with the appellants' consent entered into possession of the acquired lands on 19 September 1999, the Court of Appeal nevertheless held that the Land Administrator is the only authorised body to take possession of the scheduled land pursuant to s 48 of the LAA 1960 read together with s 18. The Court of Appeal also noted that there is no evidence I that SILK took possession with the Certificate of Urgency pursuant to s 19 of the LAA 1960. As such, the respondent is under no legal obligation to pay the late payment charges for the period from 19 September 1999.

Question 6 — Retrospective issue

[17] The Court of Appeal interpreted s 43 of the 2016 Amending Act to mean that all pending proceedings, actions, and all other matters under ss 3F and 28, sub-ss 37(2) and (3) of the LAA 1960 shall not be affected by the 2016 Amending Act and that they are to continue as if the LAA has not been amended by the 2016 Amending Act. Consequently, the Court of Appeal held that the post-amended rate of five percent under ss 32 and 48 of the LAA 1960 applies.

Question 7 — Compound interest issue

[18] The Court of Appeal did not accept the appellants' argument that guided by the principle of equivalence, the only way for the appellants to be adequately compensated and put in the position as it was before the acquisition is to award late payment charges on a compound basis. It held that the jurisdiction of the court in land reference proceedings is that as conferred by the LAA 1960 which is a special and specific law to regulate the compulsory acquisition of land and that the court must therefore keep within those confines (*Bungsar Hill Holdings Sdn Bhd v Damansara Realty Bhd* [2019] MLJU 222 (FC)).

Question 8 — Costs issue

[19] The Court of Appeal agreed with the respondent's submission that as the appellants' claim for RM12,004,000 has exceeded the amount of the High Court award of RM2,411,788.58 by more than twenty per cent, the appellants were not entitled to costs pursuant to s 51(1)(c) of the LAA 1960.

THE APPELLANTS' SUBMISSION

[20] Learned counsel for the appellants prefaced her submission with the basic principle governing compensation. Known as the principle of equivalence, this means that the landowner is entitled to be compensated fairly for his true loss including any potential value given the nature of the land and the use to which it could be out in the future. Firstly, the sum awarded should, as far as practicable, place the person in the same financial position as he would have been had there been no question of his land being compulsorily acquired. Secondly, the factors to be taken into account are governed by the First Schedule of the LAA 1960. The First Schedule stipulates that the quantum of compensation is based on the market value at the date of publication of the *gazette* of the land acquired plus the consequential loss suffered by the affected landowners. Such assessment is underpinned by the principle of equivalence. Thirdly, although the First Schedule does not define the term market value, it enumerates a process of determining market value. Although comparable sales

in the vicinity are an important component in the computation of market value, para 1(1A) of the First Schedule entitles the court to use 'any suitable method of valuation' to arrive at market value (*Semenyih Jaya*; *Leong Kam Hoong v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam and another appeal* [2001] 1 MLJ 186 at pp 190–191). Lastly, the LAA 1960 must be strictly interpreted in favour of the person who is to be deprived of his property so as to give meaning to the constitutional protection of a person's right to property (*Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor* [2013] 2 MLJ 16 at p 23). In short, the landowner whose land is acquired: (a) must be paid adequate compensation assessed based on the First Schedule; (b) such assessment must be underpinned by the principle of equivalence; and (c) provisions of the LAA 1960 must be interpreted strictly in favour of the landowner.

[21] The main points of the appellants' arguments on the questions of law are set out below.

Question 1 — Comparable acquisitions

[22] The Court of Appeal had accepted that comparable acquisitions are relevant and should be taken into account in determining market value but erred in affirming the High Court's findings that the JPPH Sale Comparable 4 is the most suitable comparable for determining the market value of the acquired lands. The Court of Appeal ought to have accepted JLW Acquisition Comparable 3 which falls under the same category of land use and located in the same district of Hulu Langat and mukim of Kajang. Despite the shared similarities, the Court of Appeal rejected JLW Acquisition Comparable 3 as there was a '… significant variance in terms of land area and the time of award' on the grounds that: (a) JLW Acquisition Comparable 3 was made outside the two year time frame used for sale comparables as it was done three years prior to the valuation of the acquired lands; and (b) the size of the land in JLW Acquisition Comparable 3 is smaller than the acquired lands and that smaller lands generally fetches higher value. Instead of rejecting JLW Acquisition Comparable 3, the Court of Appeal should have remitted the matter back to the High Court for re-assessment of the market value of the acquired lands on the basis of both sales and acquisition comparables.

Question 3 — Injurious affection for four contiguous lots issue

[23] Learned counsel prefaced her submission by arguing that in considering the compensation for injurious affection regard must not only be had to the damage actually sustained by the owner but also to damage likely to be sustained (*Collector of Land Revenue v Looi Lam* [1981] 1 MLJ 300 at p 301 (FC)). In this case, the High Court awarded injurious affection for the remainder of the acquired lands but did not award any compensation for

injurious affection for the four contiguous lots — that was the main complaint. A

[24] Learned counsel also argued that the Court of Appeal erred in finding that there existed a slip road built by LLM when in fact there was no such slip road built by LLM to access the four contiguous lots. SILK and LLM had decided to maintain the ingress/egress on the subject land of Lot 719, which is the only active access to and from the SILK Highway to the subject properties and four contiguous lots. SILK and LLM had rejected the appellants' request for a direct access from each of the four contiguous lots and Lot 1286 to the SILK Highway. B C

[25] Ingress/egress to the subject properties and the four contiguous lots were compromised due to several serious weaknesses in providing access to the same — in particular (a) a small two-lane left-in left-out road going in and coming out of the subject properties and contiguous lots; (b) the ingress/egress is a steep gradient and sharp bend to and from the SILK Highway and potentially dangerous; (c) the inadequacy and danger of the current steep ingress/egress is a very real problem faced by the Tanarata International School located on the subject properties; and (d) no public transport can stop at the subject properties and contiguous lots any longer making it less accessible to the public. As such, this is a fit and proper case to award injurious affection (*Boustead Estates Agency Sdn Bhd v Pentadbir Tanah, Baling, Kedah* [2007] 5 MLJ 401 (CA)). As such, it is inconceivable and illogical for the Court of Appeal to award compensation for injurious affection for the subject properties but not for the four contiguous lots which suffer the same negative effect. D E F

Questions 4 and 5 — Meaning of 'possession' issue

[26] Learned counsel argued that it is a clear principle of law that upon expropriation of land under statutory power, whether for the purpose of private gain or for good of the public at large, the owner is entitled to interest upon the principal sum awarded from the date when possession was taken, unless the statute clearly shows a contrary intention (*Inglewood Pulp and Paper Company, Limited v New Brunswick Electric Power Commission* [1928] AC 492 at p 499 (PC); *Satinder Singh v Umrao Singh* [1961] AIR SC 908 at p 916; *The Revenue Divisional Officer Guntu v Vasireddy Rama Bhanu Bhupal* [1970] AIR AP 262). G H

[27] Even though formal possession only take effect on 31 May 2000 (as per Form K), physical possession was in fact delivered to SILK on 19 September 1999 at SILK's request. In drawing an artificial distinction between SILK taking possession as opposed to the LA, the Court of Appeal was in effect 'punishing' the landowner for allowing access to the benefactor in good faith and extending its fullest cooperation to the need for development in this country. This also goes contrary to the principle of equivalence held in I

Semenyih Jaya. The LAA 1960 should be strictly interpreted in favour of landowners. The appellants should be awarded late payment charges calculated from the date SILK take physical possession on 19 September 1999.

Question 6 — Retrospective issue

[28] It will be recalled that the Court of Appeal held that the necessary implication of s 43 of the 2016 Amending Act is that only proceedings under ss 3F and 28, sub-ss 37(2) and (3) of the LAA shall be determined as if the LAA had not been amended. For all other proceedings, including a proceeding under s 37(1) which applies to the facts of this case, the 2016 Amending Act applies.

[29] Learned counsel argued that the Court of Appeal erred in law in not appreciating that the 2016 Amending Act which came into force on 1 December 2017 do not apply to the present land reference proceedings that were pending before the High Court prior to 1 December 2017 by virtue of s 43 of the 2016 Amending Act; which s 43 provides that all pending land reference proceedings shall be continued or concluded as if the principal Act (LAA 1960) had not been amended by the 2016 Amending Act. It was submitted that the pre-amendment rate of 8% should apply in the present case on the ground that the said amendment does not apply to cases that are still pending on court when the amendment came into force based on the saving provision of s 43 of the 2016 Amending Act. As a general rule, statutory amendments that affect substantive rights do not operate retrospectively — the substantive right of the appellant's entitlement to late payment charges at the pre-amended rate of 8%pa (s 30(1)(b) of the Interpretation Acts 1948 and 1967 ('Interpretation Acts'); *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 (PC); *National Land Finance Co-Operative Society Limited v Director General of Inland Revenue* [1994] 1 MLJ 99 at pp 106–107 (SC); *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376 at p 391 (CA); *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 at p 755 (FC)).

[30] Learned counsel further argued that even if s 43 of the 2016 Amending Act is worded to have retrospective effect for proceedings under s 37(1) of the LAA 1960, it cannot be construed to have retrospective effect because: (a) the 2016 Amending Act did not expressly provide the s 30(1)(b) of the Interpretation Acts shall not apply; (b) there is no doubt whether the Legislature had intended to impair the existing right of the landowner to be awarded late payment charges at 8% instead of 5%; and (c) that ambiguity must be construed in favour of the landowner. Like the Income Tax Act 1967, the LAA is a special Act must be construed strictly and any doubt must be resolved in favour of the landowner (*Ee Chong Pang & Ors v The Land*

Administrator of District of Alor Gajah [2013] 2 MLJ 16 at p 23; *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v Inch Kenneth Kajang Rubber Ltd* [2011] 4 MLJ 403 at p 406).

Question 7 — Compound interest issue

[31] Learned counsel argued that the words 'late payment charges' in ss 32 and 48 of the LAA 1960 should be viewed as being different from interests awarded on judgment sums; that it should encompass a larger paradigm of compensation in line with the constitutional rights/guarantees of landowners, and the necessity to endure adequate compensation in the fullest sense consistent with the principle of equivalence. The submission premised on the term 'late payment interest' in the original text of ss 32 and 48 which was substituted with the term 'late payment charges' after the said sections were amended in 1997. The Parliamentary Hansard reflects that the amendments to the LAA 1960 in 1997 were meant to ensure a fairer assessment of the value of the acquired land, as well as to ensure that the interests of landowners are protected in totality.

[32] It was submitted that late payment charges is meant to ensure that the compensation paid remains adequate as the landowner is only paid compensation based on land values at a date that is long passed by the time the acquisition proceedings are completed (*Mohd Shah bin Daud v Pentadbir Tanah dan Jajahan Kota Bharu* [2016] 3 MLJ 566; [2016] 6 CLJ 806 (CA)) and to account for the accretion to capital of the value of the land which was acquired between the time it was acquired and the time compensation was paid. Therefore, the late payment charges themselves would be capital in nature. Further, late payment charges are intended to compensate for the appreciation in the value of the land (*Ketua Pengarah Hasil Dalam Negeri v United Malacca Bhd* [2017] 8 MLJ 413; [2017] 5 CLJ 502).

[33] For good measure, learned counsel referred this court to the two cases from other jurisdictions (*San Jose Farmers' Co-operative Society Ltd v Attorney General* (1991) 43 WLR 63 (CA); *Belize; Grand Anse Estates Ltd v The Governor General et al* (Civil Appeal No 3 of 1976) CA Grenada) and the *New Zealand Law Commission Report No 28 — Aspect of Damages: The Award of Interest on Money Claims* which had recommended that interest be compounded to provide a fair and adequate compensation.

[34] Learned counsel also argued that s 11 of the Civil Law Act 1956 ('the CLA 1956') which ostensibly precludes the court from awarding interest upon interest on debts and damages, is not applicable. This is because the LAA 1960 is a special Act dealing with land acquisition, which is separate and distinct from the general principles of civil law and procedure. Further, s 11 refers to

A 'interest' whereas here we are concerned with 'late payment charges' (*Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392; *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v Inch Kenneth Kajang Rubber Limited*). Further, the Federal Court has recently held that the provision on interest payment in s 11 of the CLA 1956
B has no application to matters relating the cases under the LAA 1960 (*Bungsar Hill Holdings Sdn Bhd v Damansara Realty Bhd* [2019] MLJU 222; [2019] 4 CLJ 429 (FC)).

Question 8 — Costs issue

C

[35] Learned counsel argued that the Court of Appeal had failed to consider that the appellants were not awarded costs before the Land Administrator, in the High Courts or in the Court of Appeal or Federal Court. If not for the
D compulsory acquisition of the acquired lands in 1999, the appellants would not have had to incur valuers' costs or solicitors' costs in addition to having to expend their own time over the last 19 years.

[36] It was then submitted that s 51(1)(c) of the LAA 1960 is
E unconstitutional as it is inconsistent with the principle of equivalence which underpins the assessment of adequate compensation guaranteed under art 13 of the Federal Constitution.

THE RESPONDENT'S REPLY SUBMISSION

F

[37] By way of preliminary objection, learned counsel for the respondent argued that save and except for grounds (3), (4) and (5) relating to late payment interest in the appellants' memorandum of appeal, the other grounds relate to compensation and are not questions of law. As such the appellants are
G precluded from appealing on these issues pursuant to ss 40D and 49(1) of the LAA 1960 (*Polywell Development Sdn Bhd v Pentadbir Tanah Daerah Johor Bahru, Johor* [2014] 4 MLJ 142; [2014] 5 CLJ 129; *Syed Hussain bin Syed Junid & Ors v Pentadbir Tanah Negeri Perlis and another appeal* [2013] 6 MLJ 626; [2013] 9 CLJ 152; s 68 Courts of Judicature Act 1964). It was submitted
H that the Court of Appeal did not rule on their preliminary objection but proceeded to hear the appeal on the basis that the questions posed were questions of law.

[38] On the costs issue, it was submitted that the appellant is not entitled to
I costs as the appellants' claim exceeded by twenty percent the amount of the court award under s 51(1)(c) of the LAA 1960. Further, the appellants' argument that s 51(1)(c) is unconstitutional is premature as no leave of the Federal Court was obtained pursuant to cll (3) and (4) of art 4 of the Federal Constitution (*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri*

Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541 (FC)). A

[39] On the retrospective and compound interest issues, learned counsel for the respondent argued that as the awarding of interest is a matter of discretion of the court, the right to interest is only a procedural and not a substantive right. Therefore, the amendments to s 48 applies with retrospective effect and applies to pending proceedings as in this case (*Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [2012] 7 MLJ 597; [2012] 3 CLJ 249). At any rate, the appellant's matter does not fall under the three saving situations (ss 3F, 28 and sub-ss 37(2) and (3) of the LAA 1960) under which such proceedings shall be continued or concluded as if the LAA 1960 had not been amended by the 2016 Amending Act (s 43 of the 2016 Amending Act). As such, the High Court correctly exercised its discretion not to award compound interest. B C

[40] On the comparable acquisition issue, it was argued that High Court correctly decided that JPPH Comparable 4 is the most suitable comparable for determination of the market value of the acquired lands. The Court of Appeal found that the assessors and the High Court had taken into account the dissimilarities and made the necessary adjustments; as such, JLW Acquisition Comparable 3 was not accepted as the most suitable comparable. D E

[41] In relation to injurious affection, it was argued that the learned judge only made the decision not to award injurious affection after he had made a visit to the site in question. At any rate, the access both before and after the acquisition was and is through Lot 719. Therefore, there is no issue of no or limited access. The only issue related to the raised level of the land which factor was taken into account by both assessors. F

[42] As to what the date of possession should be, learned counsel argued that the acquired lands were acquired under s 22 of the LAA 1960 when formal possession was taken after issuance of the notice in Form K (*Pentadbir Tanah Daerah Hulu Langat v Mohamed Fawzi Mohd Yusof* [2016] 1 LNS 570; *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126; [2014] 7 CLJ 882 (CA)). Therefore, late payment interest should run from 31 May 2000 (the date of the Form K) and not from the date SILK entered into the acquired lands. G H

[43] As for the compound interest issue, learned counsel argued that there is no provision under the LAA 1960 for compound interest. The High Court had correctly followed the *Semenyih Jaya* guidelines. I

A DECISION

[44] At the outset, we note that the respondent did not appeal against the Court of Appeal's non-decision on their preliminary objection. Be that as it may, unlike other civil appeals, the avenue for appeals to the Court of Appeal and to the Federal Court under the scheme of the LAA 1960 is specifically set out under s 49.

[45] Section 49 provides that any person may appeal from a decision of the High Court to the Court of Appeal and to the Federal Court. However, it is important to note that the appeals must not relate to a decision which comprises an award of compensation: see proviso to sub-s 49(1). To underscore the finality of decisions on compensation, it is further stipulated that there shall be no further appeal on the matter: see s 40D(3). Insofar as the High Court's decision is a decision on compensation, that there shall be no appeal to the Court of Appeal is acknowledged by sub-s 68(1)(d) of the CJA 1964 which stipulates in clear and unequivocal terms that no appeal shall be brought to the Court of Appeal where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final (see also *Semenyih Jaya*, at paras [135]–[139] and [140]–[155]).

What is a question of law?

[46] It follows from the preceding paragraph that appeals to the Court of Appeal and to the Federal Court may only be mounted on questions of law. In a general sense, a question of law is an issue involving the interpretation of law (statutes or legal principles) and the application of the law to the facts of each individual case. What is a question of law has also been discussed and formulated in a line of cases:

(a) questions of law are questions about what the correct legal test is. Questions of mixed law and fact are questions about whether the facts satisfy the legal tests: *Canada (Director of Investigation and Research, Competition Act) v Southam Inc* [1997] 1 SCR 748);

(b) a question of law is a question concerning the legal effect to be given to a set of undisputed facts. This includes an issue which involves the application or interpretation of a law (*Carrier Lumber Ltd v Joe Martin & Sons Ltd* [2003] BCJ No 1602);

(c) the question of whether a decision-maker has jurisdiction to determine a particular matter is usually considered a question of law reviewable by a court on a standard or correctness (*Premium Brands Operating GP Inc v Turner Distribution Systems Limited* [2010] BCJ No 349);

(d) questions of law involve errors of law committed by a decision- maker. Errors of law includes the application of the wrong law, or a finding of fact in complete absence of any evidence (*Southam*, at [39]; *I-Ntelink Inc v Broadband Communications North Inc* [2017] MBQB 146);

(e) questions where there is real doubt as to the law on a particular point (*Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257; [1999] 1 CLJ 325 (FC)); and

(f) questions of law includes the correctness of: (a) pure statements of law (eg, as to correct interpretation of a statutory provision); and (b) the inferring of a conclusion from the primary facts (where the process of inference involves assumptions as to the legal effect of consequences of the primary facts) (*D-G of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 at p 252 (FC)).

Question 1 — Comparable acquisition issue

[47] In the light of the ruling of this court in *Semenyih Jaya*, the market value rule in para 1 of the First Schedule must not be construed strictly. As such, acquisition comparables may also be considered in assessing market value provided that regard be had to sale comparables transacted within the last two years of the date of the publication of (i) a preliminary notice of likely acquisition under s 4 in Form A; and or (ii) a declaration of intended acquisition under s 8 in Form D, as the case may be.

[48] In essence, the appellants' argument is that the learned judge committed an error of law when he failed to accept JLW Acquisition Comparable 3 as the most suitable comparable in determining the market value of the acquired lands.

[49] It must be appreciated that in a land reference hearing under the LAA 1960, the learned judge is not sitting alone. The learned judge is assisted by two court-appointed assessors, one of whom is a government valuation officer and the other a registered valuer in private practice. The role of the two assessors have been elucidated by this court in *Semenyih Jaya*, at paras [36]–[55] of the written judgment; in that case, this court declared unconstitutional sub-s 40D(1) and (2) of the LAA 1960 because of the decision-making process in determining the amount of compensation by the two assessors. The decision was predicated on the grounds that it ignored the role of judges as defenders of the Constitution and rendered the constitutional guarantee of adequate compensation illusory since that guarantee was now in the hands of two lay assessors.

Assessors as members of the Land Reference Court

[50] Of course, assessors are not the decision-makers; they only act in an advisory capacity to the judge. As members of the land reference court under the LAA 1960, assessors sit with the judge during and after the hearing, and are required to give non-binding opinions in writing on questions of fact based on the evidence. In land reference proceedings, the provisions of the Third Schedule on *Evidence and Procedure in Land Reference Cases* shall apply to the proceedings: see s 45(1A) of the LAA 1960. Pursuant thereto, the evidence to be considered by the assessors and the judge includes the applicant's valuer's report, the respondent's valuer's report, including oral evidence by the applicant's valuer and/or the respondent's valuer during cross-examination and re- examination, if any. The government assessor and the private assessor hear and consider the evidence and arrive at an opinion on the facts, which is then presented to the judge in the form of a written opinion: see s 40(c) of the LAA 1960. Even though the assessors are sources of information on matters within their own special skill or knowledge, they are not expert witnesses as their advice does not amount to evidence. More pertinently, the assessors and the judge are required to apply the *Principles Relating To The Determination of Compensation* under the First Schedule of the LAA 1960: see sub-s 47(2) of the LAA 1960.

Rationale for having two assessors

[51] In determining objections as to the amount of compensation, the court shall appoint two assessors pursuant to s 40A of the LAA 1960. One shall be a valuation officer employed by the Government and the other a private valuer registered with the Board of Valuers, Appraisers and Estate Agents. The specific requirement for each of the two assessors was introduced by the amendment to the LAA in 1997. Prior to the amendment, the original provisions in the LAA and its predecessors only stated generally that the court shall appoint two assessors.

[52] The rationale for having two assessors with these specific qualifications may be discerned from the Hansard. At the second reading of the LAA (Amendment) Bill 1997, the proposer of the Bill indicated that the assessors appointed from both government and private backgrounds were trusted to exercise professional integrity in assisting the judge. The fact that the judge has a choice between the opinions of the government assessor and the private assessor was highlighted to alleviate concerns that the government assessor may give a lower valuation (see Parliamentary Debates, House of Representatives, 15 May 1997 at pp 54–55, per the Parliamentary Secretary for the Land and Corporate Development Department Dato' Haji Fauzi bin Haji Abdul Rahman).

[53] Land reference proceedings arising from land acquisition by the state invariably involve the government (State or Federal) on the one hand and a private party whose land has been acquired on the other. It can be inferred that the appointment of one valuer from each background is a mechanism to balance the competing interests in the proceedings, and to ensure the overall neutrality of the advice given to the judge. A B

[54] Returning to the issue in hand, it is quite clear on the appeal record that both the government assessor and the private assessor had considered all the acquisition and sale comparables produced by the appellant's valuer and the government valuer. The private assessor opined that JLW Sale Comparable 1 and JPPH's Sale Comparable 4 to be the most suitable comparables; whilst the government assessor opined that the JPPH Sale Comparable 4 was the most suitable. In arriving at his decision, the learned judge had considered all the JLW's Acquisition and Sale Comparables including the JPPH Sale Comparables. The learned judge had also taken account of the opinions of the assessors before arriving at his decision. C D

[55] At any rate, question 1 is really a question relating to a decision of the High Court on compensation; accordingly, the decision is final and there shall be no further appeal on this matter: ss 40D(3) and 49 of the LAA 1960. There is nothing in the appeal record to indicate that the learned judge or the assessors have committed any error of law or in fact — in not properly considering the evidence and/or in failing to apply the principles relating to the determination of compensation. It will be recalled that the appellant's stand is that the Court of Appeal should have accepted JLW Acquisition Comparable 3 as a suitable comparable and that as such, the Court of Appeal should have remitted the matter back to the High Court for re-assessment on the basis of both sale and acquisition comparables. We think that argument is misconceived as it detracts from the underlying independence and impartiality of the assessors and the judge in land reference proceedings. It is for the assessors in their professional assessment and judgment to decide as to the suitability of the comparables for the purposes of determination of the market value. Similarly, the judge is vested with the discretionary power to consider and decide on the comparable(s) most suited for this exercise. We do not think that it is for this court to exercise our judgment on this matter and direct the assessors and the judge to assess the market value of the subject lands on the basis of both sale and acquisition comparables; that would amount to a fetter on their independence and impartiality. Ultimately, this is a matter which falls to be decided by the assessors and the judge. The ultimate decision is that of the judge and him alone. Accordingly, we decline to answer question 1. E F G H I

Question 3 — Injurious affection for four contiguous lots issue

[56] Whilst the High Court awarded injurious affection for the remainder of the subject lands at 10% of the market value, injurious affection was not awarded for the four contiguous Lots. We do not think that the appellant's argument that the Court of Appeal made an erroneous finding that there existed a slip road built by LLM is really significant. What is important to note is the fact that the learned judge and the assessors conducted a site visit on 28 February 2018 to see for themselves the situation on the ground. They were accompanied by the appellant's solicitors, the respondent's representative and the private and government valuers. The learned judge's observations at paras 28–39 are particularly relevant:

> 28. Kami mendapati sehingga sekarang, bahagian yang diambilbalik pada 1997 dan 1999 tidak ada apa-apa perubahan pembangunan.
>
> 29. Kami mendapati sebelum pengambilan, rupa bumi lot-lot subjek separas dengan jalan di hadapan.
>
> 30. Akibat pengambilan, rupa bumi lot subjek menjadi rendah, kira-kira 10 kaki dari jalan hadapan.
>
> 31. Mana-mana kenderaan yang masuk dan keluar ke Sekolah Antarabangsa Tanah Rata menghadapi kesukaran ekoran pemandangan yang terhad.
>
> 32. Kami juga mendapati jalan masuk ke Sekolah Antarabangsa Tanah Rata masih kekal sepertimana sebelum pengambilan.
>
> 33. Ekoran pengambilan, lot-lot ini masih menikmati lapisan pertama walaupun jalan hadapan yang telah ditinggikan.
>
> 34. Bagi lot 179 dan lot 1286, Pemohon menuntut sebanyak 15% daripada baki tanah nilaian yang dituntut (rujuk alasan pemohon).
>
> 35. Kedua-dua Pengapit berpendapat kadar yang berpatutan adalah 10% (rujuk justifikasi Pengapit-pengapit).
>
> 36. Selain laporan penilaian Swasta dan rebuttal, tiada affidavit yang difailkan oleh Pemohon berkaitan kesan pengambilan ke atas bahagian hadapan lot 179 dan 1286.
>
> 37. Mengambilkira kedudukan lot-lot selepas pengambilan, kadar 10% yang dicadangkan oleh kedua-dua pengapit amat memadai dan berpatutuan.
>
> 38. Dalam mencapai kadar 10% ini, hujahan peguamcara Pemohon bahawa kemudahan pengangkutan telah pun diambilkira oleh Mahkamah.
>
> 39. Berdasarkan alasan-alasan di atas, Mahkamah membenarkan award IA dan severance pada kadar 10% daripada baki tanah Lot 179 dan Lot 1286.

[57] It was following the site visit that the learned judge made his decision after considering the views of both assessors on this issue. We think that this is also a question of fact upon which the learned judge had given proper consideration in coming to his decision not to award injurious affection for the

four contiguous Lots. The learned judge's findings is not unsubstantiated by the evidence and facts on the appeal record. This is also a decision as to compensation which is final and from which there shall be no appeal. Accordingly, we also decline to answer Question 3.

Questions 4 and 5 — Meaning of 'possession' issue

[58] In our view, the determination of this question will have a direct impact on the computation of late payment charges under ss 32 and 48 of the LAA 1960 and of the LAA 1960. The appellants take the position that as SILK had with the consent of the appellants taken physical possession of the subject lands on 19 September 1999, late payment charges pursuant to ss 32 and 48 must be computed from 19 September 1999 and not from 31 May 2000, being the date stated in Form K.

Distinction between ss 32 and 48 of the LAA 1960

[59] Section 32 provides for late payment charges to be paid by the LA on the amount of compensation whereas the late payment charges under s 48 relates to the excess which is awarded by the court over and above the award made by the LA. Nevertheless, there are two important distinctions to note between ss 32 and 48. First, under s 32, time is calculated from the 'due date' until the time of such payment whereas under s 48, time runs from the date on which the LA took possession of the land to the date of payment. Second, whilst the late payment charges under s 32 is mandatory, that in respect of the excess amount under s 48 is not mandatory as it provides that the court 'may' direct that the LA shall pay the late payment charges.

[60] Insofar as it relates to the meaning of possession, it is necessary to determine whether on a proper interpretation of ss 32 and 48, the imposition of the late payment charges runs from the date of possession in law or in fact. As ss 32 and 48 are two distinct provisions in this respect, we shall deal with s 32 first.

[61] Section 32(1C) provides:

> (1C) *In this section* '*due date*' in relation to any land means *the date of taking possession of the land* or a date three months after the service of a notice under s 16(1) in respect of the land, whichever is the earlier. (Emphasis added.)

We observe that the meaning ascribed to the words 'due date' are explicitly defined for s 32 only. It envisages two alternative situations — (a) the date of taking possession; and (b) a date three months after the service of the Land Administrator's award in Form H. We do not think that it can be interpreted to mean that the 'due date' refers to the date of formal possession of the land after issuance of the notice in Form K as contended by the respondent; we say this

because there is no stipulation to say that the taking of possession must be by the Land Administrator. Therefore, on the facts and on the law, such an interpretation cannot stand against the clear wordings of sub-s (1C). As such, we are in agreement with the appellants that for the purposes of computation of late payment charges under s 32, the phrase 'taking possession of the land' in sub-s (1C) means taking physical possession of the land by SILK.

[62] Section 48 reads as follows:

> If the sum which in the opinion of the Court the Land Administrator ought to have awarded as compensation is in excess of the sum which the Land Administrator did award as compensation, the award of the Court *may* direct that the Land Administrator shall pay late payment charges on such excess at the rate of eight percent per annum *from the date on which the Land Administrator took possession of the land* to the date of payment of such excess to the Court or to the person interested. (Emphasis added.)

It is important to note that firstly, the court may direct the LA to pay late payment charges; in other words, late payment charges is at the discretion of the judge. Secondly, s 48 clearly stipulates that the computation of the late payment charges runs from the date on which the LA took possession of the land. Notwithstanding the fact that SILK took possession of the subject lands much earlier, we are of the view that the words of s 48 are clear and unequivocal; as such, taken in its natural and ordinary meaning, it means what it says — that the computation starts from the date the LA took possession of the land. It can import of no other interpretation.

[63] Notwithstanding that SILK took physical possession of the subject lands on 19 September 1999, the computation of time in s 48 must be interpreted to mean the date on which the LA took formal possession of the subject lands upon service or posting of a Form K notice (Notice That Possession Has Been Taken Of Land) under s 22. In this case, the LA is deemed to have taken formal possession on the date the Form K was issued, ie, on 31 May 2000. To hold that the computation starts from the date SILK took physical possession would do violence to the plain wordings of s 48.

Question 6 — Retrospective issue

[64] This issue also has a direct bearing on the late payment charges, in particular, on the rate of charge — whether at 8% or at 5%. Sections 32 and 48 were amended by the 2016 Amendment Act so that the rate of late payment charges shall be 5%pa instead of the previous rate of 8%pa. The appellants' argument is that they are entitled to the pre-amendment rate of 8% as the 2016 amendments to ss 32 and 48 which reduced the rate to 5% were made during the pendency of the land reference proceedings in the High Court.

[65] The 2016 Amending Act has also provided under s 49 (on *Savings and Transitional*) that the 2016 amendments shall not have any effect on '[a]ll proceedings, actions or other matters required to be done under ses 3F and 28, sub-ss 37(2) and (3) of the principal Act which are still pending or if already in progress immediately before the coming into operation' of the 2016 Amending Act.

[66] In this case the land reference proceedings were initiated at the High Court pursuant to sub-s 37(1) of the LAA 1960; as such it appears at first blush that the savings provision in s 49 of the 2016 Amending Act do not apply to this case. If so, the rate of charge applicable is 5% instead of 8%.

[67] Be that as it may, we think that there is merit in the appellants' argument. The right to late payment charges is in the nature of a substantive right, particularly so in the case of late payment charges under s 32. As a general rule, statutory amendments that affect substantive rights do not operate retrospectively. First, the 2016 Amending Act did not expressly exclude the application of s 30(1)(b) of the Interpretation Acts which provides that the repeal of a written law in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law. The Privy Council also expressed the view that '[a]part from the Interpretation Statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used' (see *Yew Bon Tew* at p 2). That a retrospective operation should not be given to a statute to impair an existing right and that one should avoid a construction that inflicts a detriment was emphasized by the then Supreme Court in *National Land Finance Co-Operative Society Limited*, at p 106 (see also *Society of La Salle Brothers* at paras [43]–[45]; *Tenaga Nasional Bhd v Kamarstone*, at paras [6]–[7]).

[68] It must be borne in mind that the LAA 1960 is a special enactment dealing with the fundamental right to property under art 13 of the Federal Constitution. As a general rule, such statutes should be construed strictly and any doubt should be resolved in favour of the landowner so as to give meaning to the constitutional protection of a person's right to his property (*Ee Chong Pang* at para [21]; *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd* at para [4]). Accordingly, we would answer Question 6 in the negative.

Question 7 — Compound interest issue

[69] In our view, the words 'compound interest issue' is a misnomer. What is in issue here is the payment of late payment charges under ss 32 and 48 of the LAA 1960, which the appellant's counsel strenuously argued ought to have been awarded to the appellants.

[70] As stated in para [60] above the late payment charges under s 32 is in respect of the amount of compensation awarded by the LA whereas that under s 48 relates to the excess, if any awarded by the High Court.

[71] It will be recalled that the LA awarded RM228,127.32 for Lot 719 and RM121,392.00 for Lot 1286; and that the award sums amounting to finding that the meaning of the words 'due date' in s 32 means the date SILK took physical possession of the land on 19 September 1999, it follows that late payment charges at the rate of 8%pa on the said aggregate sum of RM349,519.32 for the period from 19 September 1999 to 9 May 2000 should be paid to the appellants. So much for late payment charges in respect of the LA's award pursuant to s 32 of the LAA 1960.

[72] As to late payment charges on the excess sum of RM2,411,788.58 awarded by the High Court in this appeal, we note the High Court awarded late payment charges on the said sum at the rate of 5%pa calculated from 31 May 2000 to the date of payment. In view of our earlier rulings, we hold that: (a) the rate of late payment charge should be 8% and not at 5%pa; and (b) the calculation of the late payment charges shall run from 31 May 2000 (being the date the LA took formal possession of the subject lands) to the date of settlement. As the respondent had already paid the excess sum of RM708,221.66 on 6 June 2011 pursuant to the 2011 High Court order, we think that the parties will have to make the necessary adjustments to the final computation of the late payment charge in respect of the excess amount.

Question 8 — Costs issue

[73] There are two aspects to be dealt with under this issue. They relate to the costs to be awarded by the LA and by the High Court under sub-s 14(5) and 51 of the LAA respectively.

[74] Subsection 14(5) requires that the LA shall determine the amount of the costs in addition to the award. As a general rule, the use of the word 'shall' is not conclusive on the question of whether the particular requirement of law is mandatory or directory. But the circumstance that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. The wordings of sub-s 14(5) as to the amount of the costs, 'which shall include any valuation fee

imposed by the valuer, incurred in the proceedings' is indicative is consistent with the principle of equivalence; which is to allow the appellants their costs on a reimbursable basis so that they are put in a position as if the acquisition had not taken place. In this instance, the LA did not make any determination on the costs to the appellants. In our view, that is an error of law on the part of the LA warranting our intervention. We rule that costs should have been awarded pursuant to sub-s 14(5) of the LAA 1960.

[75] The High Court did not award any costs to the appellants. The Court of Appeal agreed with the respondent's submission that the claim by the appellants' claim of RM12,004,000 exceeded by more than 20% the amount of the High Court award of RM2,411,788.58. Now, sub-s 51(1)(c) of the LAA 1960 provides that 'where the claim of the applicant ... exceeds by twenty per cent or more the amount of the Court award, he shall not be entitled to his costs'. We think that it cannot be any plainer or clearer than that. Since the appellants' claim exceeded the twenty percent threshold, it follows automatically that the appellants become disentitled as a matter of law, to their costs. As the facts in this instance supports the respondent's argument, we think that no costs can be awarded to the appellants. The Court of Appeal was correct in its findings. Consequently, question 8 is answered in the negative.

CONCLUSION

[76] To recap, we decline to answer question 1 on the comparable acquisition issue and question 3 on the injurious affection issue as they are not questions of law. Firstly, the weight to be given to the acquisition and sale comparables by the learned judge and on the other evidence relating to the claim for injurious affection were essentially findings of fact on the evidence. Secondly, the questions relate to a decision of the High Court on compensation which decision is final and non-appealable under ss 40D and 49(1) respectively.

[77] In relation to the possession issues in questions 4 and 5, we hold that on the facts: (a) the phrase 'taking possession of the land' in sub-s 32(1C) of the LAA 1960 means taken physical possession of the subject lands by SILK; and (b) the phrase 'took possession of the land' in s 48 of the LAA 1960 means taking formal possession of the subject lands by the LA under s 22.

[78] Question 6 on the retrospective issue is answered in the negative. We hold that the 2016 amendments to ss 32 and 48 of the LAA 1960 are not retrospective so as to deprive the appellants of their substantive rights to late payment charges, which rights the appellants acquired and accrued when they initiated the land reference proceedings in the High Court prior to the amendments coming into force.

[79] Insofar as question 7 relating to the so-called compound interest issue is concerned, we hold that pursuant to s 32 of the LAA 1960 the appellants are entitled to late payment charges at the rate of 8%pa on the said aggregate sum of RM349,519.32 for the period from 19 September 1999 to 9 May 2000. As for the late payment charges on the excess amount, we hold that the rate applicable is 8% and that it should run from the date the LA took formal possession of the subject lands on 31 May 2000 to the date of payment.

[80] Finally, we answered question 8 on costs in the negative. The appellants' entitlement to costs in the High Court is clearly circumscribed by para (c) of sub-s 51(1) of the LAA 1960 as the appellants' claim exceeded the amount of the High Court award by more than 20%. Consequently, the appellants are not entitled to any costs in the High Court proceedings. However, we hold that the appellants are entitled to the costs under sub-s 14(5), which amount the LA is required to determine, such costs to include the valuation fee and expenses incurred in the proceedings before the LA. As there is no indication in the appellants' counsel written and oral submission as to the amount of costs that the LA should have awarded, in the interest of justice and in order not to prolong the proceedings any longer than it should, we will invite the parties to submit on the quantum before making our order as to the amount due to the appellants.

[81] For the foregoing reasons, the appeal is allowed in part with costs.

Appeal allowed in part, with costs.

Reported by Ashok Kumar